Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
All American Telephone Co.,	)	
e-Pinnacle Communications, Inc., and	)	
ChaseCom,	)	
	)	
Complainants,	)	**File No. EB-10-MD-003**
	)	
v.	)	
	)	
	)	
AT&T Corp.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: January 20, 2011 **Released: January 20, 2011**

By the Commission:

I. INTRODUCTION

1. This Memorandum Opinion and Order denies a formal complaint[1] that All American Telephone Co., e-Pinnacle Communications, Inc., and ChaseCom (collectively, the "CLECs") filed against AT&T Corp. ("AT&T") under section 208 of the Communications Act of 1934, as amended (the "Act").[2] The Complaint effectuates a primary jurisdiction referral from the United States District Court for the Southern District of New York (the "Court") in connection with litigation pending before the Court.[3] Specifically, the Complaint raises the following issues: whether AT&T violated section 201(b), section 203(c), or any other section of the Act,[4] (1) by failing to pay tariffed terminating access charges billed by the CLECs and (2) by not filing a "rate complaint" with the Commission if AT&T believed the CLECs' charges were unlawful.[5]

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[1] Formal Complaint and Motion for Declaratory Ruling of All American Telephone Co., Inc., e-Pinnacle Communications, Inc., and ChaseCom, File No. EB-10-MD-003 (filed May 7, 2010) ("Complaint").

[2] 47 U.S.C. § 208.

[3] *See All American Tel. Co., Inc. v. AT&T Corp.*, Order Referring Issues to the Federal Communications Commission, Case No. 1:07-cv-00861-WHP (S.D.N.Y. Feb. 5, 2010) ("Referral Order").

[4] 47 U.S.C. §§ 201(b) (requiring any carrier practice in connection with communication service to be just and reasonable), 203(c) (prohibiting any carrier from charging or collecting a different amount than the charges specified in its tariffs).

[5] Referral Order at 3. The Referral Order contains two very similarly-worded questions (questions 4 and 5b – *see* Referral Order at 3). *See infra* paragraph 6 (stating precise issues referred).

2. We find that neither AT&T's failure to pay the CLECs' charges nor its failure to file a "rate complaint" with the Commission violated any provision of the Act. As explained below, an allegation by a carrier that a customer has failed to pay charges specified in the carrier's tariff fails to state a claim for violation of any provision of the Act, including sections 201(b) and 203(c). This is true even if the customer is itself a carrier. Accordingly, we deny Counts I, II, and III of the Complaint.[6]

II. BACKGROUND

A. The Parties and the CLECs' Invoices

3. All American Telephone Co., Inc. ("All American"), e-Pinnacle Communications, Inc. ("e-Pinnacle") and ChaseCom were, at all relevant times, certificated to provide telecommunications service in specified parts of Utah and/or Nevada.[7] AT&T provides interexchange service (and thus is an "IXC") – also known as long-distance service – throughout the United States.[8]

4. The CLECs have federal tariffs that provide for, *inter alia*, terminating access service.[9] The CLECs sent bills to AT&T that indicated they were for the provision of terminating access service pursuant to the CLECs' tariffs.[10] The CLECs' bills totaled approximately $11 million, plus late payment penalties of approximately $3.5 million.[11] All of the calls for which the CLECs billed AT&T were to telephone numbers associated with chat line and conferencing service providers.[12] The CLECs did not market or offer local exchange services to residents or other businesses.[13] Suspecting that the CLECs

[6] In an April 2, 2010, letter ruling, the Commission directed the CLECs to file a formal complaint implementing questions 4 and 5b of the Referral Order. Letter to James F. Bendernagel, Jr., counsel for AT&T, and Jonathan E. Canis, counsel for the CLECs, from Lisa B. Griffin, Deputy Chief, EB/MDRD, File No. EB-10-MD-003 (filed Apr. 2, 2010) ("April 2 Letter Ruling"). The CLECs initially objected to this procedure, urging the Commission instead to resolve the referral by means of a declaratory ruling. Letter to Lisa B. Griffin, Deputy Chief EB/MDRD, from Jonathan E. Canis, counsel for the CLECs, File No. EB-10-MD-003 (filed Apr. 13, 2010) at 2. The CLECs further asked the Commission to "provide assurance that their Formal Complaint will not be dismissed without resolving the issues on referral." *Id.* This Order resolves the issues presented by the Court. Moreover, the Commission has broad discretion in responding to a primary jurisdictional referral, as the CLECs acknowledge. Legal Analysis, File No. EB-10-MD-003 (filed May 7, 2010) ("Complaint Legal Analysis") at 20. The procedural method used to implement the Referral Order has no bearing on the substantive outcome. Whether stemming from a petition for declaratory ruling pursuant to section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, or a formal complaint pursuant to section 208 of the Act, 47 U.S.C. § 208, the Commission's finding is that AT&T's refusal to pay the CLECs' charges, and AT&T's failure to file a "rate complaint," do not violate the Act.

[7] *See, e.g.*, Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues, File No. EB-10-MD-003 (filed July 16, 2010) ("Joint Statement") at 2-3, ¶¶ 2-4.

[8] *See, e.g.*, Joint Statement at 2, ¶ 1; Complaint at 14, ¶ 38; AT&T Corp.'s Answer to Formal Complaint, File No. EB-10-MD-003 (filed June 14, 2010) ("Answer") at 14, ¶ 38.

[9] *See, e.g.*, Joint Statement at 10, ¶¶ 40-44.

[10] *See, e.g.*, Joint Statement at 11, ¶¶ 48-49. Terminating access service is provided by local exchange carriers to IXCs to enable the IXCs' customers to complete calls to the local exchange carriers' customers. *See, e.g., In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd 8622, 8678 , ¶ 111 (2010).

[11] Joint Statement at 11, ¶¶ 48-49. All American billed AT&T $10,932,565 in terminating switched access services, plus late payment penalties of $3,446,169, and it continues to bill AT&T each month for those services. Joint Statement at 11, ¶ 52. ChaseCom billed AT&T $44,240 in terminating switched access services, plus late payment penalties of $24,566. Joint Statement at 12, ¶ 54. e-Pinnacle billed AT&T $196,744 in terminating switched access service, plus late payment penalties of $8,519. Joint Statement at 12, ¶ 56.

[12] Joint Statement at 11, ¶ 50.

[13] Joint Statement at 13, ¶ 62.

were participating in "access stimulation"[14] outside the contours of their tariffs, AT&T refused to pay the bills, except for a few invoices (totaling approximately $250,000) that AT&T alleges it paid by mistake.[15] As to those payments, AT&T requested a refund from the CLECs.[16] The CLECs have not issued any refunds.[17]

B. The Federal Court Litigation and Referral to the FCC

5. On February 5, 2007, the CLECs sued AT&T in the United States District Court for the Southern District of New York.[18] The federal court complaint, as amended on March 6, 2007, asserted four claims: (i) a collection action for amounts allegedly owed for access services provided pursuant to interstate tariffs; (ii) a claim that AT&T violated 47 U.S.C. § 201(b) by invoking "self-help" and failing to pay for the tariffed access services; (iii) a claim that AT&T violated 47 U.S.C. § 203(c) by failing to pay for the tariffed services; and (iv) a claim for compensation under quantum meruit for the telecommunications services allegedly provided.[19] AT&T filed an answer and counterclaims, asserting federal law claims that the CLECs violated sections 201(b) and 203 of the Act, and state law fraud, civil conspiracy, and unjust enrichment claims.[20] Specifically, AT&T alleged that the CLECs did not provide switched access services consistent with the terms of their tariffs.[21] AT&T also claimed that, regardless of whether the CLECs provided access services pursuant to tariff, they committed unreasonable practices through "sham" arrangements designed for the purpose of inflating access charges.[22]

6. On February 5, 2010, the Court referred the following issues, among others, to this Commission under the primary jurisdiction doctrine:

> (i) Did AT&T violate § 201(b), § 203(c), or any other provision of the Communications Act by refusing to pay the billed charges for the calls at issue?
>
> (ii) Did AT&T violate any provision of the Communications Act by refusing to pay the billed charges for the calls at issue and not filing a rate complaint with the FCC?[23]

On April 2, 2010, the Commission determined, by way of letter ruling, that the CLECs should file a

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[14] *Connecting America: The National Broadband Plan*, 2010 WL 972375 at *126 (F.C.C. Mar. 16, 2010) (describing "access stimulation" as a scheme in which "carriers artificially inflate the amount of minutes subject to [intercarrier compensation] payments," and noting that some companies have established "free" conference calling services "which provide free services to consumers while the carrier and conference call company share the [intercarrier compensation] revenues paid by interexchange carriers").

[15] Joint Statement at 11, ¶ 48. AT&T paid $249,015 to All American, $336 to ChaseCom, and $3,145 to e-Pinnacle. Joint Statement at 11, ¶ 52, 12, ¶¶ 54, 56.

[16] Joint Statement at 11, ¶ 48.

[17] Joint Statement at 11, ¶ 48.

[18] Joint Statement at 4, ¶ 11.

[19] Joint Statement at 4, ¶ 11.

[20] Joint Statement at 4, ¶ 12.

[21] Joint Statement at 4-5, ¶ 12.

[22] Joint Statement at 5, ¶ 12.

[23] Referral Order at 3.

formal complaint addressing these issues.[24]

7. On May 7, 2010, the CLECs filed their Complaint against AT&T. The Complaint alleges that AT&T has engaged in "unlawful self-help" in violation of sections 201(b) (Count I) and 203(c) of the Act (Count II) by refusing to pay the CLECs' charges for use of their local network services to complete long distance calls.[25] The Complaint further alleges that AT&T violated section 201(b) of the Act (Count III) by failing to bring a "rate complaint" against the CLECs if AT&T believed their access charges were unlawful and instead refusing to pay the charges.[26]

8. AT&T timely filed an Answer to the Complaint on June 14, 2010,[27] and All American filed its Reply on July 6, 2010.[28] The parties submitted Joint Statements on July 16, 2010.[29] At a July 26, 2010, status conference, Commission staff determined that, in light of the parties' submissions, there is no dispute over relevant material facts and, accordingly, no need for discovery or briefing in the case.[30]

III. DISCUSSION

9. For the following reasons, the answer to both of the Court's questions addressed in this Order is "no." AT&T did not violate sections 201(b), 203(c), or any other provision of the Communications Act by refusing to pay the billed charges for the calls at issue, regardless of whether it filed a rate complaint with the FCC. Accordingly, the CLECs' claims are denied.

10. Under section 208 of the Act, the Commission has authority to adjudicate only claims

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[24] April 2 Letter Ruling at 2. Prior to the primary jurisdiction referral addressed in this Order, the Court had issued a separate referral concerning AT&T's "sham entity" counterclaims. *See All American Telephone Co. v. AT&T, Inc.*, Memorandum & Order, 2009 WL 691325 (S.D.N.Y. Mar. 16, 2009). To effectuate that referral, AT&T filed a formal complaint with the Commission pursuant to section 208 of the Act. The April 2 Letter Ruling ordered AT&T to amend the formal complaint it had filed in that proceeding, *AT&T Corp. v. All American Tel. Co., Inc.*, File No. EB-09-MD-010 ("*AT&T v. All American*"), to address the remaining issues referred by the Court. Therefore, this Order addresses only issues 4 and 5b referred by the Court. The Order does not express any view regarding the issues raised in *AT&T v. All American*.

[25] Complaint at 24-25.

[26] Complaint at 25.

[27] *See supra* note 8.

[28] Reply and Legal Analysis in Support of Formal Complaint and/or Request for Declaratory Ruling of All American Telephone Co., Inc., e-Pinnacle Communications, Inc., and Chasecom, File No. EB-10-MD-003 (filed July 6, 2010) ("Reply").

[29] *See supra* note 7*;* Joint Statement Pursuant to 47 C.F.R. § 1.733(b)(1)(i)-(iv), File No. EB-10-MD-003 (filed July 16, 2010).

[30] Letter to Jonathan E. Canis, counsel for the CLECs, and James F. Bendernagel, counsel for AT&T, from Lisa B. Griffin, Deputy Chief, EB/MDRD, File No. EB-10-MD-003 (filed July 28, 2010). *See, e.g.,* 47 C.F.R. § 1.732(c) ("In cases in which discovery is not conducted, absent an order by the Commission that briefs be filed, parties may not submit briefs."); *Amendment of Rules Governing Procedures To Be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497 (1997) (subsequent history omitted) at 22508, ¶¶ 22-23; 22529, ¶ 71; 22534, ¶ 81; 22536, ¶ 87; and 22605-6, ¶ 267 (The Commission's formal complaint rules "were designed to promote fact-based pleadings and to shift the focus of fact-finding away from costly, time-consuming discovery and towards the pre-filing and initial complaint and answer periods . . . [P]arties shall be generally prohibited from filing briefs in cases in which no discovery is conducted.").

alleging that a carrier has somehow violated the Act itself.[31] During the past twenty years, the Commission has repeatedly held that an allegation by a carrier that a customer has failed to pay charges specified in the carrier's tariff fails to state a claim for violation of any provision of the Act, including sections 201(b) and 203(c) – even if the carrier's customer is another carrier. These holdings stem from the fact that the Act generally governs a carrier's obligations to its customers, and not vice versa. Thus, although a customer-carrier's failure to pay another carrier's tariffed charges may give rise to a claim in court for breach of tariff/contract, it does not give rise to a claim at the Commission under section 208 (or in court under section 206) for breach of the Act itself.[32] This long-standing Commission precedent that "collection actions" fail to state a claim for violation of the Act has been acknowledged and followed by courts.[33]

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[31] 47 U.S.C. § 208 (authorizing the Commission to adjudicate complaints regarding "anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof"). *See Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 55 U.S. 45, 52-58 (2007).

[32] *Contel of the South, Inc. v. Operator Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 548, 551, 555-56, ¶¶ 7, 19 (2008) (quoting *U.S. TelePacific Corp. v. Tel-America of Salt Lake City, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 24552, 24555-56, ¶ 8 (2004) ("[T]he Commission does not act as a collection agent for carriers with respect to unpaid tariffed charges")); *Qwest Communications Corp. v. Farmers and Merchants Mutual Telephone Corp.*, Memorandum Opinion and Order, 22 FCC Rcd 17973, 17984-85, ¶ 29 (2007) (subsequent history omitted) ("[A]ny complaint by Farmers to recover [tariffed access] fees allegedly owed by Qwest would constitute a 'collection action,' which the Commission has repeatedly declined to entertain"); *In the Matter of Developing a Unified Intercarrier Compensation Regime; T-Mobile Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855, 4861 n.40 (2005) ("A complaint requesting that we make such findings [regarding specific obligations of any customer of any carrier to pay any tariffed charges] would not state a cause of action for which the Commission can grant relief"); *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457, 7472 n.93 (2004) (same as *U.S. TelePacific v. Tel-America*); *Graphnet, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 17 FCC Rcd 1131, 1135, ¶ 12 (2002) ("[T]he obligations of section 203(c) apply to the carrier that filed the tariff"); *AT&T Corp. v. BellAtlantic-Pennsylvania*, Memorandum Opinion and Order, 14 FCC Rcd 556, 598-600 & n.240 (1998) (stating that "the Commission has no authority" to conduct "adjudications of carrier's rights against their customers"); *Beehive Tele., Inc. v. Bell Operating Cos.*, Memorandum Opinion and Order, 10 FCC Rcd 10562,10569, & n.90 (1995) (subsequent history omitted) ("This Commission is not a collection agent for carriers with respect to unpaid tariffed charges;" thus, "[t]he BOCs' cross-claim does not allege a violation of the Act over which we have jurisdiction") (interior quotation marks omitted); *Illinois Bell Tel. Co. v. AT&T*, Order, 4 FCC Rcd 5268, 5270, ¶ 18 (1989) ("The complaints do not allege that AT&T, in its role as a carrier, acted or failed to act in contravention of the Communications Act ... Rather, they allege conditionally that AT&T may have failed to pay the lawful charge for service. Such allegations do not state a cause of action under the complaint procedures and are properly dismissed."), *recon. denied*, 4 FCC Rcd 7759, 7760, ¶ 3 (1989) ("BOCs, as carriers, may not bring a complaint against AT&T in its capacity as a customer."). *Accord American Sharecom, Inc. v. Mountain States Tele. & Telegraph Co.*, Memorandum Opinion and Order, 8 FCC Rcd 6727 (Com. Car. Bur. 1993); *C.F. Communications Corp. v. Century Tel. of Wisconsin*, Memorandum Opinion and Order, 8 FCC Rcd 7334 (Com. Car. Bur. 1993) (subsequent history omitted); *Long Distance/USA, Inc. v. Bell Tel. Co. of Pa.*, Memorandum Opinion and Order, 7 FCC Rcd 408 (Com. Car. Bur. 1992); *America's Choice Communications, Inc. v. LCI International Telecom Corp.*, Memorandum Opinion and Order, 11 FCC Rcd 22494, 22504 (FC&I Br., Enf. Div., Com. Car. Bur. 1996); *Tel-Central v. United Tel. Co.*, Memorandum Opinion and Order, 4 FCC Rcd 8338, 8340-41, ¶ 16 (1989) ("*Tel-Central v. Unitel*") ("[T]h[e] statutory scheme does not constitute the Commission as collection agent for carriers with respect to unpaid tariffed charges. In the normal situation, if a carrier has failed to pay the lawful charges for services or facilities obtained from another carrier, the recourse of the unpaid carrier is an action in contract to compel payment...."). We will refer collectively to all of the foregoing orders as the "*Collection Action Orders*."

[33] *See, e.g.*, *MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407, 1418 (D.C. Cir. 1995), *cert. denied*, 517 U.S. 1129 (1996) (declining to permit the Commission to reduce the damages that a carrier owed its customer-carrier by the amount the customer-carrier allegedly owed the carrier, "because this would involve a determination of the carrier's rights against a subscriber, over which th[e] Commission has no jurisdiction") (quoting *Thornell Barnes*

(continued …)

11. Applying the foregoing precedent to the instant case, the CLECs' claims that AT&T violated the Act must be denied. Each of the CLECs' three claims hinges on the contention that either section 201(b) or section 203(c) of the Act requires AT&T to pay the CLECs' tariffed access charges. In other words, each of the claims is exactly the kind of "collection action" that the Commission has repeatedly held fails to state a claim for violation of the Act.

12. The CLECs acknowledge the existence of the *Collection Action Orders*: "[T]he CLECs know that they cannot file a collection action as a section 208 Formal Complaint – that is why they filed their collection actions with the SDNY court."[34] They argue, however, that the Complaint is not really a collection action, because the Court rather than the Commission will ascertain and award any damages owed.[35] This is a distinction without a difference. By focusing on whether this case is a "collection action," the CLECs fail to recognize that the reason the Commission does not hear collection actions is that *a failure to pay tariffed access charges does not constitute a violation of the Act.* Accordingly, the CLECs have no claim in a court or at the Commission that AT&T violated the Act in its role as a customer.

13. According to the CLECs, several Commission orders state that under the Act, declining to pay charges allegedly accrued under a tariff without first challenging the tariffed rate via a section 208 complaint is a form of "self-help" in which a carrier never can engage.[36] We do not endorse such withholding of payment outside the context of any applicable tariffed dispute resolution provisions. Nonetheless, the Commission has never held that a failure to pay tariffed charges violates the Act itself.[37]

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Co. v. Illinois Bell Telephone Co., Decision, 1 FCC 2d 1247, 1275, ¶ 67 (1965)); *American Telephone & Telegraph Co. v. The People's Network, Inc.*, 1993 WL 248165, at *15 (D.N.J. 1993) ("AT&T's only recourse against [its customer] TPN is in an action in contract to compel payment of the unpaid charges in this court. Complete relief cannot be afforded before the FCC, which simply lacks the collection remedies for AT&T which this court provides.") (interior quotation marks omitted).

[34] Reply at 15. The Complaint does not address the *Collection Action Orders*. The Reply attempts unsuccessfully to distinguish one – *Graphnet v. AT&T*, *supra.* Reply at 17. Although the CLECs correctly observe that *Graphnet v. AT&T* involved, among other things, an allegation of traffic mis-routing, they do not explain how that fact makes a difference. The core holding of *Graphnet v. AT&T* – that section 203(c) of the Act governs the tariffing-carrier's obligations, not the customer-carrier's obligations – applies to traffic pricing as well as traffic routing. As the Commission stated: "We agree with AT&T that Graphnet has not met its burden of proving a violation of section 203(c). As is evident from the statute's language, the obligations imposed by section 203(c) apply to the carrier that filed the tariff. In this case, that carrier is Graphnet, which seeks to enforce its tariff against AT&T. Section 203(c) simply does not control AT&T's obligations here." 17 FCC Rcd at 1135, ¶ 12.

[35] *See, e.g.*, Reply at 16.

[36] *See, e.g.*, Complaint at 8, ¶¶ 21, 23; Complaint, Legal Analysis at 5-9, 12, 17-19; Reply at 6, 17 (citing *Communique Telecommunications, Inc. d/b/a LOGICALL*, Declaratory Ruling and Order, 10 FCC Rcd 10399 (Com. Car. Bur. 1995), *aff'd*, 14 FCC Rcd 13635 (1999); *MCI Telecommunications Corp.*, Memorandum Opinion and Order, 62 FCC 2d 703 (1976); *Business WATS, Inc. v. AT&T Co.*, Memorandum Opinion and Order, 7 FCC Rcd 7942 (Com. Car. Bur. 1992); *NOS Commc'ns, Inc. v. AT&T Co.*, Memorandum Opinion and Order, 7 FCC Rcd 7889 (Com. Car. Bur. 1992); *Affinity Network, Inc. v. AT&T Co.*, Memorandum Opinion and Order, 7 FCC Rcd 7885 (Com. Car. Bur. 1992); *Business Choice Network v. AT&T Co.*, Memorandum Opinion and Order, 7 FCC Rcd 7702 (Com. Car. Bur. 1992)).

[37] None of the orders cited by the CLECs (1) involves a claim for collection of tariffed charges; (2) holds that the alleged failure to pay tariffed charges constitutes a violation of the Act; (3) requires a carrier to pay the tariffed charges allegedly owed; or (4) distinguishes or even mentions any of the *Collection Action Orders*. *See Bell-Atlantic Delaware, Inc. v. Global NAPs, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 20665, 20677, ¶ 29 (2000) (holding that "these cases [on which the CLECs rely here] only mean that the use of 'self-help' undercuts a
(continued …)

14. Other "self-help" cases cited by the CLECs also are inapposite, for the same reasons.[38] In fact, one of those cases is actually a *Collection Action Order*,[39] and it explains why the Commission denies claims seeking payment of tariffed charges:

> [T]his statutory scheme [*e.g.*, section 208 of the Act] does not constitute the Commission as collection agent for carriers with respect to unpaid tariffed charges. In the normal situation, if a carrier has failed to pay the lawful charges for services or facilities obtained from another carrier, the recourse of the unpaid carrier is an action in contract to compel payment, or a termination or disconnection of service until those charges have been paid.[40]

Thus, the "self-help" orders on which the CLECs rely do not undermine the *Collection Action Orders* or otherwise support the CLECs' assertion that AT&T's failure to pay their access charges and not file a "rate complaint" constitutes a violation of section 201(b) or 203(c) actionable under the Communications Act.[41]

15. The CLECs further rely on the Commission's 2001 *CLEC Access Charge Reform Order*,[42] pointing out that the Commission expressed concern about interexchange carriers failing to pay CLEC access charges that they believed to be unreasonable.[43] It is true that, as a small part of that *Order's* description of background information, the Commission stated that such failures to pay were "problematic."[44] But nowhere did the Commission hold that such failures to pay were violations of the Act. To the contrary, the Commission essentially reiterated what the *Collection Action Orders* hold – that failures to pay may constitute breaches of tariff actionable in court, but not breaches of the Act: "[A]n

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claim of irreparable injury for the purpose of emergency relief."). *See also American Telephone & Telegraph Co. v. NOS Communications, Inc.*, 830 F. Supp. 225, 228-29 (D.N.J. 1993).

[38] *See, e.g.*, Complaint Legal Analysis at 7, 12, 17; Reply at 6-7 (citing *Allnet v. The Bell Atlantic Telephone Companies*, Memorandum Opinion and Order, 8 FCC Rcd 5438 (1993); *MCI Telecommunications Corp. v. American Telephone and Telegraph Co.*, Decision, 94 FCC 2d 332 (1983); *Brooten v. AT&T*, Memorandum Opinion and Order, 12 FCC Rcd 13343, 13351 n.53 (Com. Car. Bur. 1997); *National Communications Association, Inc. v. American Telephone and Telegraph Co.*, 2001 WL 99856 (S.D.N.Y. 2001)). The CLECs also rely on a Wireline Competition Bureau order holding that carriers may not engage in "unreasonable call blocking" in response to access charges perceived to be unlawful. *See, e.g.*, Complaint at 25, Complaint Legal Analysis at 6, Reply at 6-7 (citing *In re Establishing Just and Reasonable Rates for Local Exchange Carriers; Call-Blocking by Carriers*, Declaratory Ruling and Order, 22 FCC Rcd 11629 (Wireline Comp. Bur. June 28, 2007) ("*WCB Call Blocking Order*")). That *Order* has no bearing on this case, however, because AT&T has not blocked calls, and its failure to pay the CLECs' access charges therefore has no effect on "the ubiquity and reliability of the nation's telecommunications network." *WCB Call Blocking Order*, 22 FCC Rcd at 11629, ¶ 1.

[39] *See, e.g.*, Complaint Legal Analysis at 7, Reply at 6 (citing *Tel-Central v. Unitel*).

[40] *Tel-Central v. Unitel*, 4 FCC Rcd at 8340-41, ¶ 16.

[41] There are two additional "self-help" cases similar to those cited by the CLECs. *See Carpenter Radio Co.*, Memorandum Opinion and Order, 70 FCC 2d 1756 (1979); *The Bell Telephone Co. of Pennsylvania*, Memorandum Opinion and Order, 66 FCC 2d 703 (1977). Those cases also are not persuasive, for the same reasons explained above.

[42] *Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001) ("*2001 CLEC Access Charge Reform Order*").

[43] *See, e.g.*, Complaint at 7-9, 19, ¶¶ 17, 19, 22, 23, 61; Complaint Legal Analysis at 8, 9, 11, 12, 15, 16; Reply at 7, 8, 11.

[44] *2001 CLEC Access Charge Reform Order*, 16 FCC Rcd at 9932, ¶ 23.

IXC that refused payment of tariffed rates within the safe harbor would be subject to suit on the tariff *in the appropriate federal district court*…."[45] Buttressing that statement, the Commission also observed that "our tariff rules were historically intended to protect purchasers of service from monopoly providers, not to protect sellers from monopsony purchasing power."[46] Indeed, it is ironic that the CLECs rely on the *2001 Access Charge Reform Order*, given that the *Order's* focus was "to eliminate regulatory arbitrage opportunities that previously have existed with respect to tariffed CLEC access charges."[47] Thus, the *2001 CLEC Access Charge Reform Order* does not support the CLECs' claims here.

16. The CLECs also rely on several Commission orders and a court opinion holding that a carrier's failure to pay per-call compensation to payphone service providers in accordance with the Commission's payphone compensation rules constitutes a violation of section 201(b) of the Act.[48] In the CLECs' view, if a carrier's failure to pay per-call compensation to payphone service providers is a violation of section 201(b), then surely a carrier's failure to pay access charges is such a violation, as well.[49]

17. The Commission has already explained why the payphone analogy raised by the CLECs fails.[50] The Act requires the Commission to adopt rules ensuring that payphone service providers receive compensation for every completed call originated from their payphones.[51] To implement that statutory directive, the Commission adopted rules requiring certain carriers to pay to originating payphone service providers a fixed amount for each completed payphone call handled by those carriers.[52] In subsequent decisions, the Commission held that a carrier's failure to pay the amount required to be paid by the Commission's payphone compensation rules constitutes a violation of our payment rules and a violation of section 201(b) of the Act.[53]

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[45] *2001 CLEC Access Charge Reform Order*, 16 FCC Rcd at 9948, ¶ 60 (emphasis added)**.** *See also id.* at 9964, n.188 (stating that "[t]his order's creation of a presumption that rates at or below the tariff benchmark are just and reasonable will facilitate CLECs' attempts to collect their access charges *through an action in the appropriate court*") (emphasis added).

[46] *2001 CLEC Access Reform Order*, 16 FCC Rcd at 9957, ¶ 85.

[47] *2001 CLEC Access Charge Reform Order*, 16 FCC Rcd at 9924, ¶ 3. In a part of the *2001 CLEC Access Charge Reform Order* not referenced by the CLECs, a remark is made that the Act and Commission rules require IXCs to pay tariffed CLEC access charges. *2001 CLEC Access Charge Reform Order*, 16 FCC Rcd at 9934-35, ¶ 28. This remark, however, merely reinforces the undisputed notion that tariffs govern carrier-customer relationships and that "parties are precluded from negotiating separate agreements that affect the rate for services once a tariff has been filed." *See id* at n.71. Therefore, we view this remark as inconsequential to the analysis here.

[48] *See, e.g.*, Complaint Legal Analysis at 7-8 (citing *APCC Services, Inc. v. Radiant Telecom, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 8962 (2008); *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.* 550 U.S. 45 (2007); *APCC Services, Inc. v. Network IP, LLC*, Memorandum Opinion and Order, 20 FCC Rcd 2073 (2005); *Bell Atlantic-Delaware v. Frontier Communications Services, Inc.*, Order on Review, 15 FCC Rcd 7475 (2000)).

[49] Complaint Legal Analysis at 8.

[50] *Contel of the South, Inc. v. Operator Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 548, 551 (2008); *Telepacific Corp. v. Tel-American of Salt Lake City*, Memorandum Opinion and Order, 19 FCC Rcd 24552, 24555-56, nn. 27, 28, 29 (2004).

[51] 47 U.S.C. § 276.

[52] 47 C.F.R. §§ 64.1300 – 64.1340.

[53] *See, e.g., APCC Services, Inc. v. Radiant Telecom, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 8962 (2008); *APCC Services, Inc., et al. v. Network IP, LLC, et al.*, Order on Review, 21 FCC Rcd 10488, 10492-95, ¶¶ 10-16 (2006), *aff'd in relevant part and remanded in part sub nom., NetworkIP, LLP v. FCC*, 548 F.3d 116 (D.C. Cir. 2008); *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*,

(continued …)

18. By stark contrast, the provisions of the Act and our rules regarding access charges apply only to the provider of the service, not to the customer; and they govern only what the provider may charge, not what the customer must pay.[54] Thus, failure to pay does not breach any provisions of the Act or Commission rules.

19. In addition, the CLECs cite *Qwest v. Farmers*[55] (and cases cited therein), which, according to the CLECs, holds that a carrier is always entitled to at least some compensation for a service rendered, even if the service is not specified in its tariff.[56] The CLECs reason that, if a carrier is always entitled to some compensation for a service rendered, then AT&T's failure to pay any compensation for the CLECs' termination of AT&T's traffic must violate the Act.[57] The CLECs' reasoning fails. *Qwest v. Farmers* does not hold that a carrier is *always* entitled to some compensation for a service rendered, even if the service is not specified in its tariff. *Qwest v. Farmers* merely holds that a carrier *may* be entitled to some compensation for providing a non-tariffed service, depending on the totality of the circumstances.

20. In the end, the CLECs can point to only one Commission decision arguably holding that a carrier-customer's failure to pay access charges can constitute a violation of section 201(b) of the Act – *MGC v. AT&T*.[58] Almost ten years ago, however, at least one federal district court had already noted that the Commission "ha[d] questioned the continuing validity and scope of the *MGC* decision."[59] And during those ten years, the Commission has re-affirmed the *Collection Action Orders* at least six times,[60] and noted the incongruity of *MGC v. AT&T* at least twice.[61] Indeed, the only question discussed extensively in *MGC v. AT&T* was *not* whether a failure to pay access charges was a violation of the Act, but "whether AT&T took the appropriate steps effectively to terminate the arrangement with MGC for the acceptance

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Report and Order, 18 FCC Rcd 19975, 19990, ¶ 32 (2003); *see also Metrophones Telecommunications, Inc. v. Global Crossing Telecommunications, Inc.*, 423 F.3d 1056, 1067-70 (9th Cir. 2005) (and Commission orders cited therein), *aff'd, Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S. 45 (2007).

[54] *See, e.g.*, 47 U.S.C. § 203; 47 C.F.R. §§ 69.1 – 69.731; *see* n.32, *supra*. *See generally 2001 CLEC Access Charge Reform Order*, 16 FCC Rcd at 9957 (stating that "our tariff rules were historically intended to protect purchasers of service from monopoly providers, not to protect sellers from monopsony purchasing power"); *In the Matter of Communique Telecommunications, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 13635, 13649, ¶ 26 (1999) (subsequent history omitted) (stating that "[a]lthough some provisions of the Act protect ratepayers and others benefit common carriers, there is no statutory entitlement to a perfectly balanced regulatory regime. ICTC's notion of absolute symmetry in carrier and ratepayer remedies is not embodied in the Act") (quotation marks and footnotes omitted).

[55] *Qwest Communications Corp. v. Farmers and Merchants Mutual Telephone Co.*, Second Order on Reconsideration, 24 FCC Rcd 14801 (2009) ("*Qwest v. Farmers*").

[56] Complaint at 6, ¶ 12, Complaint Legal Analysis at 9, 10; Reply at 6, n.6 (citing *Qwest v. Farmers*, 24 FCC Rcd at 14812 n.96).

[57] Complaint Legal Analysis at 9-10.

[58] *MGC Communications, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 11647 (Com. Car. Bur.), *aff'd*, *MGC Communications, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 308 (1999) (collectively, "*MGC v. AT&T*").

[59] *Advamtel, LLC v. Sprint Communications Co.*, 125 F.Supp.2d 800, 807 (E.D. Va. 2001) (subsequent history omitted).

[60] *See*, *supra* note 32 (first six orders cited).

[61] *Telepacific v. Tel-America*, 19 FCC Rcd at 24555, n.27; *IP Telephone Declaratory Ruling*, 19 FCC Rcd at 7471-72, n.93.

of originating access traffic."[62] To the extent the Commission's decision in *MGC* can be read to stand for the proposition that a carrier's failure to pay access charges violates the Act, we hold that it is not good law.

21. In sum, all three of the CLECs' claims rest on the assertion that AT&T's failure to pay their tariffed access charges violates section 201(b) and/or section 203(c) of the Act. That assertion is erroneous. The law is settled that a carrier-customer's failure to pay tariffed access charges does not violate either section 201(b) or section 203(c) of the Act. Accordingly, all three of All-American's claims must be denied for failure to state a claim cognizable under section 208 (or any other provision) of the Act.

IV. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201, 203, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 203, and 208, that Count I of Complainants' Formal Complaint IS DENIED for failure to state a claim cognizable under section 208 of the Act.

23. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201, 203, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 203, and 208, that Count II of Complainants' Formal Complaint IS DENIED for failure to state a claim cognizable under section 208 of the Act.

24. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201, 203, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 203, and 208, that Count III of Complainants' Formal Complaint IS DENIED for failure to state a claim cognizable under section 208 of the Act.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[62] *MGC v. AT&T*, 14 FCC Rcd at 11651, ¶ 7. Because neither party involved in *MGC* acknowledged the existence of the *Collection Action Orders*, such orders were not addressed in either the Bureau or Commission decisions in that proceeding. We note that the Commission's rules require parties to formal complaint proceedings, among other things, to distinguish opposing legal authority and to ensure that relevant legal authorities are current and updated as necessary. *See, e.g.*, 47 C.F.R. § 1.720(e), (g).